# APPENDIX A

**NOT FOR PUBLICATION**

UNITED STATED COURT OF APPEALS

FOR THE NINTH CIRCUIT

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No. 05-56386

PAPER, ALLIED-INDUSTRIAL CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION, LOCAL 8-192, AFL-CIO,,

Plaintiff- Appellant,

v.

TXI RIVERSIDE CEMENT CO.,

DEFENDANT - APPELLEE.

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*D.C. No. CV-05-00406-VAP*

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**MEMORANDUM***

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Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding
Argued and Submitted June 6, 2007
Pasadena, California

Before: THOMAS and GOULD, Circuit Judges, and CHESNEY**, District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Maxine M. Chesney, Northern District of California, sitting by designation.

Paper, Allied-Industrial Chemical & Energy Workers International Union, Local 8-192 ("PACE"), appeals the district court's dismissal of its complaint for failure to state a claim. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we reverse and remand. Because the parties are familiar with the facts and procedural history, we do not recount them here.

We review dismissals under Federal Rule of Civil Procedure 12(b)(6) de novo. *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001).

"The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960). The Supreme Court has further explained that

> The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that

> the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Doubts should be resolved in favor of coverage.*

*United Steelworkers of America v Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960) (emphasis added); see also *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986).

Whether Riverside Cement Company ("RCC") agreed to arbitrate this dispute is a matter of contract interpretation. *Operating Engineers Local Union No. 3 v. Newmont Mining Corp.*, 476 F.3d 690, 692 (9th Cir. 2007). "To ascertain the meaning of this collective bargaining agreement, we first examine its express written terms." *Northwest Administrators Inc. v. B. V & B.R. Inc.*, 813 F.2d 223, 225 (9th Cir. 1987). "'[W]here a contract's meaning is not clear on its face, its interpretation depends upon the parties' intent at the time it was executed, which is an issue for the trier of fact." *Arizona Laborers, Teamsters and Cement Masons Local 395 Health and Welfare Trust Fund v. Conquer Cartage Co.*, 753 F.2d 1512, 1515 (9th Cir. 1985) (quoting *Laborers Health & Welfare Trust Fund v. Kaufman & Broad*, 707 F.2d 412, 418 (9th Cir. 1983) (citations omitted)). "When the operation of an ordinary contract is not clear from its language, a court generally may consider extrinsic evidence to determine the intent of the parties in including that language." *Id.* at 1517 (citing 3 *Corbin on Contracts* § 536, 27-28 (1960)). "That principle is applied with even greater liberality in the case of a collective bargaining agreement." *Id.* "In ascertaining the intent of the parties to a collective bargaining agreement, 'the trier of fact may look to the circumstances surrounding the contract's execution, including the preceding negotiations. . . . It may also consider the parties' conduct subsequent to contract formation . . . and such conduct is to be given great

weight.'" *Id.* at 1517-18 (quoting *Laborers Health & Welfare Trust Fund*, 707 F.2d at 418 (citations omitted)). "A district court should also 'consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements.'" *Id.* at 1518 (quoting *Kemmis v. McGoldrick*, 706 F.2d 993, 996 (9th Cir. 1983) (citing *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157, 160-61 (1966)); *see also Hendricks v. Airline Pilots Association International*, 696 F.2d 673, 676 (9th Cir. 1983). "As we have emphasized, when an agreement's meaning is not clear on its face and contrary inferences as to intent are possible, there exists an issue of material fact. . . ." *Id.*

While a collective bargaining agreement ("CBA") is a contract, it also must be construed in light of the Labor Management Relations Act, 29 U.S.C. §§ 141-187. *See Northwest Administrators Inc.*, 813 F.2d at 226 ("A collective bargaining agreement is governed by the detailed provisions of the Labor Management Relations Act, 29 U.S.C. §§ 141-187, and ERISA. It is not 'governed by the same old common-law concepts which control.. . private contracts,'") (quoting *Transportation-Communication Employees Union*, 385 U.S. at 160-61)).

Here, the parties dispute the meaning of the term "employees" in the CBA and whether the benefit plans referred to in Appendix B, Section 7, include the retiree benefit plan. While the CBA clearly distinguishes between employees based on their role and title, it does not as clearly distinguish between employees based on their time of employ. Indeed, the phrase "*employed* by the employer"—which is used to describe who is covered—is susceptible of meaning both currently "employed" and previously "employed." Had RCC intended to include only *current* employees, it could have easily used that phrase, which it used elsewhere in the

CBA. For instance, the drug-testing policy in Section 5 of Appendix C refers to "Current Employees."

Likewise, Appendix B, Section 7's reference to benefit plans could plausibly be read to include the retiree benefit plan. First, Section 7 says it includes all benefit plans, including but not limited to those listed in Appendix B. But there are no other benefit plans listed anywhere in the CBA. Second, the retiree plan meets the definition of plans referred to in Section 7 since it is a "benefit plan" that was "negotiated between the parties."

As a general matter, "a union [does not lose] all interest in the fate of its members once they retire." *United Steelworkers v. Canron*, 580 F.2d 77, 81 (3d Cir. 1978) (quoting *Rosen v. Public Service Electric & Gas Co.*, 477 F.2d 90, 94 n.8 (3d Cir. 1973). It is therefore not inconceivable that a union and an employer would seek to enter a CBA covering both current and retired employees. While the terms of the agreement do not speak specifically of "retired" employees, neither does it explicitly exclude them, contrary to RCC's claim. In sum, it is at least plausible that the CBA was intended to cover both current and former employees. When there is any reasonable dispute, the Supreme Court instructs that the policies embodied by the Labor Management Relations Act are best furthered when courts err on the side of finding coverage. *Warrior & Gulf Navigation Co.*, 363 U.S. at 582-83; *see also Canron*, 580 F.2d at 82 (finding coverage under the CBA when "[t]he parties reasonably differ as to its meaning").

Therefore, we conclude that the district court erred in dismissing the complaint. We remand to allow the parties to develop a complete factual record and to present appropriate evidence to the district court as to the meaning of the contract.

**REVERSED AND REMANDED.**

# APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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PAPER, ALLIED-INDUSTRIAL CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION, LOCAL 8-192, AFL-CIO,

*Plaintiff*

v.

TXI RIVERSIDE CEMENT CO.; AND DOES 1-10,

*Defendants.*

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CASE NO. EDCV 05-406-VAP (SGLx)

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[MOTION FILED ON JULY 7, 2005.]

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## ORDER GRANTING DEFENDANT RIVERSIDE CEMENT CO.'S MOTION TO DISMISS

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Defendant Riverside Cement Co.'s Motion to Dismiss came before the Court for hearing on August 1, 2005. After reviewing and considering all papers filed in support of, and in opposition to, the Motion, as well as the arguments advanced by counsel at the hearing, the Court GRANTS the Motion.

## I. BACKGROUND

On May 13, 2005, Plaintiff Paper, Allied-Industrial, Chemical & Energy Workers International Union, Local 8-192, AFL-CIO filed a Compliant against Defendant TXI Riverside Cement Co. and Does One Through Ten. On May 18, 2005, Plaintiff filed an Amended Complaint seeking specific performance of the collective bargaining agreement ("CBA"). On May 20, 2005, Plaintiff served the Amended Complaint on TXI Riverside Inc. and Riverside Cement Co. as Does One and Two, respectively. The parties filed a stipulation dismissing without prejudice TXI Riverside Inc. on June 20, 2005.

Defendant Riverside Cement Co. ("Defendant RCC") filed a Motion to Dismiss on July 7, 2005. Plaintiff filed an Opposition ("Opp'n") on July 18, 2005, and Defendant RCC filed a Reply on July 25, 2005.

## II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a party may bring a motion to dismiss for failure to state a claim upon which relief can be granted. Dismissal is appropriate when it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations set forth in the pleading. See Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir. 2000); Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1101 (9th Cir. 1999).

The Court must view all allegations in the complaint in the light most favorable to the non-moving party and must accept all material allegation – as well as any reasonable inferences to be drawn therefrom – as true. See Big Bear Lodging Ass'n, 182, F.3d at 1101; Am. Family Ass'n, Inc. v. City and County of San Francisco, 277 F.3d 1114, 1120 (9th Cir. 2002).

## III. DISCUSSION

In the Amended Complaint, Plaintiff seeks specific performance of the arbitration provision in the CBA in order to compel Defendant to arbitrate a grievance filed regarding changes in the health benefit plans of retired employees. [See Amended Complaint ("Am. Compl.") ¶ 10.] Defendant RCC asserts that Plaintiff cannot state a claim for specific performance because it "cannot allege [that Defendant RCC] has breached any term of the CBA with regard to retiree benefits since retiree benefits are not covered under the CBA." [Mot. at 7.] According to Defendant RCC, "[t]he explicit terms of the CBA specifically cover only production and maintenance *employees* employed by [Defendant RCC] at its Oro Grande facility." [Id.]

Plaintiff maintains that Defendant RCC is required to arbitrate this grievance because it fails to show "that the arbitration clause is not susceptible of an interpretation that covers this dispute." [Opp'n at 8 (quoting United Steel Workers v. Canron, Inc., 580 F.2d 77, 82 (3d Cir. 1978)).] The arbitration clause in the CBA covers grievances regarding retiree benefits, according to Plaintiff, in language found in the Appendix B, Section 7, of the CBA, stating: "All Benefit Plans, including, but not limited to, those named in this Appendix B, were negotiated between the parties and cannot be amended, replaced and/or terminated unless required by applicable laws and/or regulations, or upon negotiations with the Union." [Mot., Ex. A at 81.[3]] According to Plaintiff,

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[3] Defendant RCC asks the Court to take judicial notice of nine documents attached to the Motion Exhibits A through I. [Defendant's Request for Judicial Notice in Support of Motion.] Plaintiff objects to six of these documents, which it maintains are not specifically referred to or necessarily relied upon in the Complaint. [Opp'n at 3 (citing Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir.

a plausible interpretation of this language encompasses retired employees' benefits because "[i]f this provision covered only current employees, there would be no reason to include it in the CBA, because the health benefits of current employees are a mandatory subject of bargaining under the NLRA and, therefore, cannot be changed except 'upon negotiations with the Union' already under the NLRA." [Opp'n at 6.] Thus, Plaintiff argues, an interpretation of the Appendix B, Section 7 that does not cover retired employees' benefits would render that provision surplausage.[4]

Defendant RCC asserts that Appendix B, Section 7 does not cover retired employees because under the CBA they are not "employees", which is defined as "[a]ll production and maintenance employees employed by the employer at its Oro Grande, California facility." [Reply at 2; Mot., Ex. A at 14.] Defendant RCC also contends that retired employees fall outside the scope of the CBA as they are never explicitly referred to in the CBA and are not a subject of mandatory bargaining under the National Labor Relations Act. [Mot. at 7-8; Reply at 2.]

There is no basis for construing Appendix B, Section 7 of the CBA to control retired employees' benefits because retired employees are not "employees" as defined in the CBA. The Court is not persuaded by Plaintiff's contention that Appendix B, Section 7 is susceptible to an interpretation covering the benefits of retired

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1984)).] Plaintiff has no objection to three exhibits—Exhibits A, F, and H—which were referred to and relied on in the Complaint. The Court sustains Plaintiff's objections to Exhibits B, C, D, E, G, and I, and takes judicial notice of Exhibits A, F, and H.

[4] Plaintiff's counsel reiterated this point at the hearing on August 1, 2005, and also argued that Defendant RCC failed to proffer any alternative interpretation of this language.

employees because an interpretation of this provision that is limited to current employees would render it entirely superfluous. This argument may be persuasive where the CBA defined "employees" to include retired employees or where other provisions expressly make reference to retired employees, as in the case cited by Plaintiff; however, there is no such evidence here. Therefore, even assuming that Defendant's proffered interpretation would render this provision a redundant statement of governing law, that alone does not support its contention that this provision is susceptible to an interpretation covering retired employees' benefits.

In Canron, the employer and union disputed the application of the collective bargaining agreement to retired employees of a company acquired by the employer. 580 F.2d at 78-79. The employer maintained that the retired employees of the predecessor company were not covered by a bargaining agreement memorialized years after the acquisition of the predecessor company because these retirees were never employed by the employer. Id. at 80. The Third Circuit compelled arbitration, finding that the parties reasonably differed as to the proper interpretation of a provision in which the employer "agree[d] to provide Blue Cross and Blue Shield coverage for retired employees and all eligible dependants." Id. at 78-79, 82. The court stated that the employer's argument was "not sufficient in the circumstances [of the case] . . . to meet [the employer's] burden that the arbitration clause is not susceptible of an interpretation that covers this dispute." Id. at 82.

Here, Defendant RCC has met its burden of demonstrating that the arbitration clause is not susceptible of an interpretation covering Plaintiff's grievance. The CBA between Plaintiff and Defendant RCC does not include a provision analogous to the one found in teh Canron case, which expressly provided health care coverage for a

class of retired employees. Given that the CBA defines "employees" as persons "employed" by Defendant RCC at its Oro Grande facility and the agreement contains no express reference to retired employees, the arbitration clause in the CBA is not susceptible to an interpretation covering Plaintiff's grievance. Therefore, Plaintiff fails to state a claim for specific performance of the CBA.

## IV. CONCLUSION

For the foregoing reasons, Defendant RCC's Motion to Dismiss is GRANTED.

**IT IS SO ORDERED**